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Abstracts

Articles

**The Rise and Fall of Comparative
Constitutional Law in the Postwar Era**

David Fontana 1

In the first few decades after World War II, comparative constitutional law rose to a prominent position in American law schools, only to disappear almost entirely in the years after the Warren Court, in part because of the Court's decisions. During the years after World War II, Justices of the Supreme Court (from William Douglas to Felix Frankfurter to Earl Warren) and deans of major American law schools (like Harvard Law School Dean and later Nixon Solicitor General Erwin Griswold) traveled the country and the world encouraging everyone to examine the constitutional law of other countries. Law reviews featured many articles about comparative constitutional law, sometimes nearly as many as about decisions of the U.S. Supreme Court. With time, though, the attention devoted to the Warren Court and the Court's decisions led to the disappearance of comparative constitutional law from the American legal world. This Article discusses this previously undiscovered history of comparative constitutional law and the reasons for the disappearance of this field for long periods of the history of American law schools. This lost history can also teach us much about constitutional law scholarship in the United States, because many of the major developments in constitutional scholarship had actually been tried elsewhere—yet these developments went unnoticed in the United States. In order to prevent this situation from recurring, this Article suggests new reforms to American legal education.

Rights Beyond Borders

Chimène I. Keitner 55

The central question of whether, and when, a country's domestic rights regime constrains government action beyond national borders has largely escaped comparative analysis. This Article seeks to fill that gap. Part I provides a typology of basic approaches to rights beyond borders, which I label country, compact, and conscience. Country-based reasoning takes a strictly territorial approach to regulating the government's actions outside the national territory, even vis-à-vis citizens. Compact-based reasoning focuses on the entitlement of a given individual to assert rights against the government based on his or her status as one of the governed, regardless of territorial location. Conscience-based reasoning holds that a government should act in the same way beyond its borders as it does within them.

Part II uses this framework to analyze the evolving jurisprudence of extraterritorial rights in three common law jurisdictions: the United States under the U.S. Constitution, Canada under the Canadian Charter of Rights and Freedoms, and the United Kingdom under the U.K. Human Rights Act. This comparative analysis reveals the continued tenacity of country-based reasoning, which privileges the role of territory in conceptualizing domestic rights. In the end, the most generative source of more expansive readings of domestic rights provisions might not be any comprehensive theory about the extraterritorial reach of rights, but rather individual judges' own senses of fundamental fairness and the perceived need for a minimum set of judicially enforceable legal constraints on the action of the political branches. To date, such judicially enforceable constraints continue to be provided by domestic, rather than international, rights guarantees.

Property law today faces what may be its greatest challenge ever: changing from a domestic legal institution into one that accommodates globalization. Central to this trend are bilateral investment treaties (BITs), which appear to offer an optimal solution for the protection of foreign investors' property rights by reducing uncertainty and enhancing the credibility of states' commitments. We argue, however, that the notion of property is significantly more complex than first meets the eye. The move to a "property discourse" in connection with foreign investment under a BIT regime consequently may become complex and uncertain. This Article thus breaks ranks with conventional wisdom by pointing to crucial aspects of heterogeneity in property law and identifying the intricacies of BIT property protection. We present new empirical evidence on the link between cultural heterogeneity and property rights protection, showing that such protection depends on the level of cultural autonomy—a cultural orientation that emphasizes individuals' uniqueness. We then analyze several additional facets of heterogeneity with regard to actors, assets, and legal norms, all of which underscore the complexity of property systems.

Note

Aligning Incentives for Development: The World Bank and the Chad-Cameroon Oil Pipeline

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The World Bank used the Chad-Cameroon Oil Pipeline to test the theory that anticorruption measures can defeat the resource curse. After Chad repeatedly failed to adhere to the Bank's revenue management plan, the Bank withdrew from the pipeline project, and most labeled the experiment a failure. Drawing on extensive personal interviews from Chad and other evidence on the state of the pipeline today, this Note argues that the failure of the Bank's strategy in Chad was not inevitable. Rather, the Bank's failure resulted from (1) insufficient institutional will to consider non-economic variables, which resulted in (2) inappropriate project design details. In general, the model of the Bank as a development coordinator for resource investment projects remains ripe with potential. Using the Chad-Cameroon Pipeline as an example, this Note argues that private resource investments in underdeveloped countries drives development failures due to the natural misalignment of participant incentives. The World Bank can and should step in to align incentives towards development, specifically by promoting greater stakeholder participation and a longer time horizon. The case of the Chad-Cameroon Oil Pipeline demonstrates that the World Bank can succeed as a development coordinator, but that its success is contingent on significant internal institutional reform.